

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Application by New York)
Telephone Company (d/b/a Bell)
Atlantic – New York), Bell Atlantic)
Communications, Inc., NYNEX)
Long Distance Company, and Bell)
Atlantic Global Networks, Inc., for)
Authorization To Provide)
In-Region, InterLATA Services in)
New York)

CC Docket 99-295

REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES

Jonathan Askin
Vice President – Law
THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS
SERVICES
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 969-2597

THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES
By: Jonathan E. Canis
Ross A. Buntrock
Michael J. Francesconi
Kelley Drye & Warren LLP
1200 19th Street, N.W.
FIFTH FLOOR
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (fax)

Its Attorneys

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SUMMARY

The record reveals that Bell Atlantic-New York's ("Bell Atlantic's") Application for Section 271 authority suffers from several discrete, but competitively significant deficiencies. Across the board, comments filed by competitors indicate that while Bell Atlantic has made great strides in its efforts to comply with its obligations under the Act, Bell Atlantic remains unable to demonstrate that it is capable of performing in several critical areas. First, Bell Atlantic is unable to provide access to unbundled local loops; specifically, competitive carriers and DOJ confirm that Bell Atlantic is unable to perform hot cuts and provide DSL-capable loops in a manner that complies with the Act. Second, many carriers indicated in their initial comments that they have experienced serious delays in obtaining interconnection trunks from Bell Atlantic, and that Bell Atlantic has been extremely tardy in provisioning unbundled dedicated transport (*i.e.*, high capacity DS-3 and T1 circuits). Furthermore, a host of commenters substantiated ALTS' concerns regarding Bell Atlantic's failure to adhere to the Commission's collocation rules. In addition, the record reflects widespread concern that too many open issues, such as DSL loop provisioning procedures, hot cut performance, and compliance with the Commission's UNE Remand Order, are being dismissed at this stage and left to be addressed by either Bell Atlantic's promises to comply at some future date, or the Performance Assurance Plan. ALTS members agree with DOJ that while Bell Atlantic has, undoubtedly, come well within sight of the 271 finish line, it has not yet crossed it. Therefore, under the terms of Act, the Commission has no other choice but to reject Bell Atlantic's Application until such time as the problems identified on the record are resolved.

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| New York |) | |

**REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Service (“ALTS”), by its attorneys, and pursuant to the Commission’s September 29, 1999 Public Notice in the above-captioned proceeding, hereby submits these reply comments on the Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York (“Application”).¹ ALTS is the leading national trade association representing facilities-based competitive local exchange carriers (“CLECs”).

¹ *Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. for Authorization To Provide In-Region, InterLATA Services in New York*, CC Docket No. 99-295, Public Notice, DA 99-2014 (rel. Sept. 29, 1999) (“Application”).

I. INTRODUCTION

The record reveals that Bell Atlantic-New York's ("Bell Atlantic's") Application for Section 271 authority suffers from several discrete, but competitively significant deficiencies. Across the board, comments filed by competitors indicate that while Bell Atlantic has made great strides in its efforts to comply with its obligations under the Act, Bell Atlantic remains unable to demonstrate that it is capable of performing in several critical areas. First, Bell Atlantic is unable to provide access to unbundled local loops; specifically, competitive carriers and the Department of Justice ("DOJ") confirm that Bell Atlantic is unable to perform hot cuts and provide DSL-capable loops in a manner that complies with the Communications Act of 1934, as amended ("Act"). Second, many carriers indicated in their initial comments that they have experienced serious delays in obtaining interconnection trunks from Bell Atlantic, and that Bell Atlantic has been extremely tardy in provisioning unbundled dedicated transport (*i.e.*, high capacity DS-3 and T1 circuits). Furthermore, a host of commenters substantiated ALTS' concerns regarding Bell Atlantic's failure to adhere to the Federal Communications Commission's ("Commission's") collocation rules. In addition, the record reflects widespread concern that too many open issues, such as DSL loop provisioning procedures, hot cut performance, and compliance with the Commission's UNE Remand Order, are being dismissed at this stage and left to be addressed by either Bell Atlantic's promises to comply at some future date, or the Performance Assurance Plan. ALTS members agree with DOJ that while Bell Atlantic has, undoubtedly, come well within sight of the 271 finish line, it has not yet crossed it. Therefore, under the terms of Act, the Commission has no other choice but to reject Bell Atlantic's Application until such time as the problems identified on the record are resolved.

II. THE RECORD REFLECTS THAT BELL ATLANTIC DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO UNBUNDLED LOCAL LOOPS

The New York Public Service Commission (“New York Commission”) concluded that “[loop] issues affecting competition have been resolved and on-time performance demonstrated,”² despite a record replete with significant problems, the existence of which have been borne out by the results of the KPMG Test,³ Bell Atlantic’s own statistics, and the well-documented experiences of competitors. The New York Commission conceded that concerns remain regarding Bell Atlantic’s ability to provide unbundled local loops, but despite the absence of a track record of their efficacy, the New York Commission is relying upon “procedures and training” which Bell Atlantic has promised to “put in place to maximize the effective loop ordering and provisioning.”⁴ Not only is reliance upon Bell Atlantic’s promises to address loop issues post-271 entry an invitation for anti-competitive behavior, it is also violates the requirement that a BOC demonstrate it “is providing” each of the items enumerated in the 14-point competitive checklist codified in Section 271(c)(2)(B).⁵ In its UNE Remand Order the Commission concluded that the hot cut process impairs the ability of competitors to provide timely service and stated that “incumbent LEC promises of future hot cut performance [are] insufficient to support a Commission finding that the coordinated loop cutover process does not

² Evaluation of the New York Public Service Commission, *In re: Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. for Authorization To Provide In-Region, InterLATA Services in New York* at 99 (Oct. 19, 1999) (“New York Commission Evaluation”).

³ See *New York Department of Public Service Bell Atlantic OSS Evaluation Project Final Report*, KPMG Final Version 2.0 at II-4 (Aug. 6, 1999) (“KPMG Final Report”).

⁴ New York Commission Evaluation at 99.

⁵ See *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd 539, ¶ 78 (1997)

(continued...)

impair the ability of a requesting carrier Our insistence on actual performance--and not future promises--of incumbent LEC compliance with our rules is not new.”⁶

A. Bell Atlantic’s Hot Cut Performance Remains Deficient

The record of this proceeding unequivocally supports the evaluation of the U.S. Department of Justice, which concludes that, “Bell Atlantic’s performance in processing orders for hot cuts of unbundled loops appears to suffer from a number of deficiencies which, collectively, impose significant costs on CLECs and degrade the quality of service they can offer to their customers.”⁷ As the Commission is fully aware, “[r]eliable performance in completing hot cuts correctly and at the time scheduled is extremely important because of the risk to the customer of losing dial tone for more than a brief period.”⁸ Nonetheless, the record demonstrates that Bell Atlantic is not yet capable of performing this critical function in a manner that complies with its legal obligations. DOJ concludes that Bell Atlantic “fails to complete scheduled hot cuts on time in a significant number of cases – around 10 percent of orders, even under statistics most favorable to Bell Atlantic.”⁹ The experience of ALTS members bears out DOJ’s conclusion. For example, Allegiance Telecom, Inc. reports that it continues to suffer from poor hot cut performance by Bell Atlantic, experiencing a hot cut failure rate of just under 20% in recent

(...continued)

(“BellSouth South Carolina Order”) (citing *Ameritech Michigan Section 271 Order*, ¶ 110).

⁶ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order*, CC Docket 96-98, FCC 99-238 at ¶ 271, n. 541 (rel. Nov. 5, 1999) (“UNE Remand Order”).

⁷ Evaluation of the United States Department of Justice, *In the Matter of Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. for Authorization To Provide In-Region, InterLATA Services in New York*, CC Docket 99-295 at 14 (Nov. 1, 1999) (“DOJ Evaluation”).

⁸ *Id.* at 18.

⁹ *Id.*

months. Other ALTS members report a similar level of performance.¹⁰ As Allegiance points out, CLECs suffer competitive and financial harm when the hot cut process fails.¹¹

Furthermore, the poor hot cut performance experienced by ALTS members and noted by DOJ is masked by inadequate metrics that suffer from “serious deficiencies,”¹² and which produce statistics that are at worst misleading, at best incomplete; these metrics do not adequately mirror the real world experiences of competitors. DOJ and the New York Commission share ALTS’ concern¹³ that the existing New York performance measures suffer from several severe limitations.¹⁴ The New York Commission indicated that the hot cut performance metrics are in need of modification. In fact, the New York Commission stated that Bell Atlantic has “committed to modify the [hot cut] performance reporting *upon its entry into the interLATA market*” in order to reflect whether or not “the key step in the revised hot cut provisioning process” – the Bell Atlantic check for CLEC dial tone on the line two days before the hot cut (“DD-2”) – is performed in a timely manner.¹⁵ Further, Bell Atlantic, “recognizing the potential service disruption problem” faced by CLECs, “has proposed that the installation codes (I-codes) measuring troubles reported within seven days of installation, should be disaggregated to show hot cut troubles specifically” as well as to “specify installation troubles

¹⁰ Comments of Allegiance at 11.

¹¹ *Id.*

¹² DOJ Evaluation at 15.

¹³ Comments of ALTS at 30.

¹⁴ DOJ Evaluation at 6, 15 (noting that “there appear to be serious deficiencies in a number of the key performance measures relating to unbundled loops”).

¹⁵ New York Commission Evaluation at 88 (emphasis added).

for hot cut loops within seven days.”¹⁶ ALTS submits that the law requires these fixes be in place *prior to* the grant of 271 authority.

Bell Atlantic’s poor hot cut performance has, to date, “severely limited or completely postponed” the ability of some CLECs to provide service in New York through the use of unbundled loops.¹⁷ Having said that, ALTS concurs with DOJ, and does not wish to suggest that a small deviation from any single standard established by the New York Commission should be dispositive in evaluating Bell Atlantic’s Application. At bottom, however, ALTS submits that a clear record of consistent compliance with its obligation to provide unbundled local loops should be evident, and the deficiencies identified in this record regarding both the establishment of performance metrics and Bell Atlantic’s actual performance should not be disregarded by the Commission.¹⁸ ALTS is not as confident as the New York Commission that the fixes promised by Bell Atlantic, including modified hot cut reporting, will resolve the hot cut problems experienced by CLECs.¹⁹ In any event, Bell Atlantic’s performance on this record does not comply with the Act.²⁰

B. Bell Atlantic’s Ability To Provision DSL-Capable Loops Does Not Comply With Its Obligations Under The Act

The information on the record demonstrates clearly that there are serious and unresolved issues relating to Bell Atlantic’s ability to provide DSL-capable loops to competitors. Despite their conclusion that unbundled local loop issues “have been resolved and on-time

¹⁶ *Id.* at 90.

¹⁷ DOJ Evaluation at 21.

¹⁸ *See id.*

¹⁹ New York Commission Evaluation at 92.

²⁰ DOJ Evaluation at 22.

performance demonstrated,”²¹ the New York Commission conceded that many outstanding issues remain regarding Bell Atlantic’s ability to provision xDSL loops. The New York Commission’s passing grade is premised upon the fact that it is “optimistic” that the New York DSL collaborative will resolve the multitude of outstanding issues.²² While ALTS shares the New York Commission’s optimism that the tough problems associated with DSL loops in New York will be addressed in time, it is clear that the existing record does not demonstrate Bell Atlantic’s compliance with its legal obligations in connection with the provision of DSL-Capable loops.

DOJ concludes that serious and unresolved issues remain regarding Bell Atlantic’s ability to: (1) provide preordering information; (2) provide timely firm order commitments; (3) install loops in a timely manner; and (4) install loops correctly.²³ The experience of ALTS members again bears out DOJ’s conclusion. For example, Covad reported that during August 1999 “only 13% of loops that Covad ordered from Bell Atlantic in New York were provisioned on time.”²⁴ Bell Atlantic’s own performance numbers show that Bell Atlantic has filled ADSL orders on time under 60% of the time.²⁵

The record clearly demonstrates that Bell Atlantic’s performance in provisioning DSL-capable loops is unsatisfactory, and does not approach a level where it could be said that Bell Atlantic provides DSL-capable loops in a nondiscriminatory fashion.²⁶ While ALTS is confident that its members and Bell Atlantic will be able to resolve DSL loop issues in the near

²¹ New York Commission Evaluation at 99.

²² *Id.*

²³ DOJ Evaluation at 24-25.

²⁴ Comments of Covad at 5.

²⁵ DOJ Evaluation at 26.

term, the Application filed by Bell Atlantic does not demonstrate that “CLECs currently have access to DSL loops” in a manner necessary for them to compete effectively.²⁷ As such, Bell Atlantic fails to satisfy a critical checklist item and the Commission should reject Bell Atlantic’s Application accordingly.

III. BELL ATLANTIC DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO INTERCONNECTION

The record before the Commission reflects a widespread consensus that Bell Atlantic has not complied with its obligation under Section 271(c)(2)(B)(i) to provide nondiscriminatory interconnection. The Commission cannot ignore the significant problems experienced by competitors which are amassed in this record.

A. The Record Reveals That Competitors Are Experiencing Serious Problems With Bell Atlantic’s Trunking Performance

In its evaluation of Bell Atlantic’s Application, the New York Commission found that Bell Atlantic currently provides trunking pursuant to approved tariffs and interconnection agreements²⁸ — implying that Bell Atlantic is doing everything that it needs to do to ensure that competitive conditions exist in the New York local exchange services market. The experience of ALTS members stands markedly in contrast to the New York Commission’s assessment.

For purposes of evaluation, trunking performance can be divided into four distinct areas: ordering; provisioning; maintenance and repair; and network performance. An obstacle in any one of these areas will result in the inability of a CLEC to satisfactorily interconnect to the local network, and thus, result in an inability to adequately compete with the incumbent to serve

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²⁶ See *id.* at 27.

²⁷ See *id.* at 28.

²⁸ New York Commission Evaluation at 18.

a local service customer. In its evaluation, the New York Commission acknowledged that CLECs have taken specific issue with the failure of Bell Atlantic to provide them with interconnection trunks in a timely manner, but found that such conditions recently have been remedied by Bell Atlantic.²⁹ ALTS believes that these unacceptable conditions continue to exist. Several ALTS members note that they continue to experience deficiencies with Bell Atlantic's trunking performance.

Several commenters cited Bell Atlantic's inability to timely provision both small and large numbers of requests for interconnection trunks. e.spire/Net2000 highlighted Bell Atlantic's "inability to meet interconnection trunk intervals" when provisioning requests for small numbers of interconnection trunks (up to 192 trunks).³⁰ In addition, Teligent reports that Bell Atlantic has failed to provision large interconnection trunk orders (greater than 192 trunks) within the thirty-day standard interval.³¹ Teligent further noted that performance data regarding large orders is not captured or reflected in Bell Atlantic's performance data.³² This omission permits Bell Atlantic to avoid accounting for untimely provisioning of large orders which Teligent believes to be the "*sine qua non* of competition."³³ While Teligent provides a single example of an order for 690 trunks that is over 50 business days outstanding (and counting), it states that its experience represents a "pattern of repeated conduct."³⁴

²⁹ See *id.* at 19.

³⁰ Comments of e.spire/Net2000 at 16 (noting that the standard interval for "small" requests is 18 days); see also *id.* at 16-21 (detailing the problems experienced by e.spire when ordering trunks from Bell Atlantic).

³¹ Comments of Teligent at 9-13.

³² *Id.* at 11.

³³ *Id.* at 9, 11.

³⁴ *Id.* at 12.

In its comments, Allegiance stated that Bell Atlantic was late in provisioning interconnection trunks and that such delays slowed deployment of its second New York-based switch.³⁵ Prism Communication Services stated that Bell Atlantic was timely in less than 10% of the deliveries of local interconnection facilities ordered by Prism.³⁶ CompTel reported that several of its members are not receiving interconnection trunks at parity with Bell Atlantic retail customers.³⁷ CompTel stated that the results of such disparate treatment include degraded cash flow and damaged business relationships with customers because of delayed service activation.³⁸

ALTS agrees with DOJ that “the ability to obtain interconnection trunks on a reasonable and timely basis is critically important,” and therefore “the Commission should consider” carefully the trunking problems cited by competitors, many of which ripened following the conclusion of the bulk of the New York Commission’s examination of Bell Atlantic’s compliance.³⁹

B. Bell Atlantic Is Not Providing Collocation In Compliance With The Act

The New York Commission found that Bell Atlantic’s provision of collocation is in compliance with the FCC’s *Collocation Order* and the Act. However, in its footnote to that finding, the New York Commission noted that Bell Atlantic was making “minor revisions to the [state collocation] tariff.”⁴⁰ It would seem to be a contradiction for Bell Atlantic to be in compliance with federal collocation rules and at the same time have a need to revise its tariff to comport with those rules. ALTS submits that the record shows that Bell Atlantic has not

³⁵ Comments of Allegiance at 11 (noting that these provisioning delays continue).

³⁶ Comments of Prism Communication Services at 20.

³⁷ Comments of CompTel at 20.

³⁸ *See id.* at 21.

³⁹ DOJ Evaluation at 11, n.20.

⁴⁰ New York Commission Evaluation at 24 and n.3.

satisfied its requirement to furnish collocation in accordance with Sections 251(c)(2), 252(d)(1) and, furthermore, Bell Atlantic has not yet met the checklist requirement set out in Section 271(c)(2)(B)(i).

ALTS' initial comments demonstrated that provisions of the Bell Atlantic collocation tariff remain in violation of the FCC's *Collocation Order* and associated rules.⁴¹ Specifically, we noted that Bell Atlantic imposes unnecessary provisioning and implementation delays on CLEC collocation requests.⁴² Furthermore, the Commission's UNE Remand Order concluded that collocation delays "diminish the ability of a competitive LEC to provide services it seeks to offer...by delay[ing] competitive LECs from responding quickly to the demand for its services in a rapidly changing market."⁴³ The record clearly demonstrates that the experience of competitors bears out ALTS' assessment of Bell Atlantic's provision of collocation.

For example, DSL.net, Inc. reported that it continues to experience unresolved collocation issues in New York and stated that these issues must be remedied prior to granting Bell Atlantic Section 271 authority.⁴⁴ DSL.net stated that the lengthy installation intervals for physical and virtual collocation "obstruct timely market entry" and that Bell Atlantic is unnecessarily limiting the alternative forms of collocation available to CLECs by failing to provide for "adjacent collocation."⁴⁵ Another CLEC, ChoiceOne Communications, questioned whether Bell Atlantic was in compliance with the collocation portion of the 271 checklist item

⁴¹ Comments of ALTS at 49-64.

⁴² *See id.* at 50-56.

⁴³ UNE Remand Order ¶ 270.

⁴⁴ Comments of DSL.net, Inc. at 7-8.

⁴⁵ *Id.* at 7-8 (noting that the Pennsylvania PUC recently ordered BA-PA to tariff twelve forms of collocation in compliance with the FCC's *Advanced Service Order*); *see also* comments of @link Networks, Inc. Comments, at 5-6 (stating that Bell Atlantic has not
(continued...)

asking why Bell Atlantic, under its current collocation tariff, may “separate its equipment from CLEC equipment” in violation of the FCC’s *Collocation Order*.⁴⁶

Even the New York Commission acknowledges that collocation facilities are sometimes incomplete or unserviceable when provided to CLECs for the commencement of their competitive services. In its evaluation, the New York Commission noted Bell Atlantic’s admission that “collocation cages may not be complete on the day they are turned over to the CLEC.”⁴⁷ While the New York Commission went on to state that Bell Atlantic intended to remedy this situation with better inspections and a checklist, the fact remains that Bell Atlantic presently does not timely provide collocation facilities capable of being utilized upon delivery to a provider of competing local exchange service. As the Commission has held, pledges of remedies and promises of future performance have “no probative value in demonstrating present compliance with the requirements of Section 271.”⁴⁸

C. The New York Commission Acknowledged That Bell Atlantic’s On-Time Performance for Provisioning Dedicated Transport Has Been Poor

In its evaluation, the New York Commission found that Bell Atlantic is currently provisioning unbundled transport orders for CLECs at parity with comparable retail orders, and that Bell Atlantic is in compliance with checklist requirement (v).⁴⁹ This evaluation is contrary to the New York Commission’s own record, as well as, the experiences of several commenters in this proceeding.

(...continued)

yet demonstrated the adequate availability of cageless collocation offerings because many of these offerings are scheduled rather than now existing).

⁴⁶ Comments of ChoiceOne Communications at 10-11.

⁴⁷ New York Commission Evaluation at 25.

⁴⁸ BellSouth South Carolina Order, ¶ 38.

⁴⁹ New York Commission Evaluation at 103-104.

Allegiance indicated that Bell Atlantic was often late in providing requested transport facilities in the third quarter of this year. Of the DS3 transport facilities ordered by Allegiance during this period, 40% were not delivered timely, directly resulting in: (1) the failure of Allegiance to meet consumer demand for its services; (2) damage to Allegiance's reputation as a New York facilities-based service provider; and ultimately (3) the inability to compete effectively in the local service market with Bell Atlantic.⁵⁰ ChoiceOne Communications noted a similar experience and stated that "on a consistent basis" Bell Atlantic has failed to install entrance facilities in a timely manner.⁵¹ As a result, ChoiceOne was unable to use its collocation arrangements for several weeks after collocation ready dates, because Bell Atlantic fails to install entrance facilities on time.⁵² Additionally, the experiences of Omnipoint, a broadband PCS provider in New York, have been consistent with that of the CLECs: Bell Atlantic fails to provide nondiscriminatory unbundled access to DS1 and DS3 dedicated transport services in violation of checklist item (v). Omnipoint stated that Bell Atlantic has been late in providing firm order commitment dates by an average of 8 days between 34% and 65% of the time since Omnipoint began ordering DS1 transport from Bell Atlantic in 1996.⁵³ In addition, Focal indicated that it has been the victim of discriminatory performance by Bell Atlantic. Recently, one of Focal's customers ordered identical DS-1 circuits from Focal and from Bell Atlantic; the Bell Atlantic circuit was delivered weeks before the Focal circuit.⁵⁴ Bell Atlantic has not demonstrated that it adequately provides interconnection trunks, collocation, or

⁵⁰ Comments of Allegiance at 12.

⁵¹ Comments of ChoiceOne Communications at 9.

⁵² *Id.* at 9-10.

⁵³ Comments of Omnipoint at 7-8 (citing statistics from over 360 requests for DS-1 service).

⁵⁴ Comments of Focal at 6.

dedicated transport, and thus Bell Atlantic has not shown that it provides nondiscriminatory access to interconnection.

IV. BELL ATLANTIC HAS NOT DEMONSTRATED COMPLIANCE WITH RESALE OBLIGATIONS UNDER THE ACT

In its Application, Bell Atlantic candidly admits that it will impose termination penalties on Bell Atlantic customers who switch to resellers.⁵⁵ As ALTS indicated in its initial comments, Bell Atlantic, as part of its *prima facie* case, must demonstrate that any termination liability it seeks to impose is just and reasonable.⁵⁶ The record clearly demonstrates that Bell Atlantic has come nowhere close to supporting its claim that the termination penalties it may impose on customers switching to resellers are just and reasonable. Accordingly, Bell Atlantic has failed to meet its obligation to show that it offers resale without unreasonable or discriminatory conditions.

A. The New York Commission's Evaluation Of Bell Atlantic's Compliance With Its Resale Obligations Stated Only That It Has Not Been Made Aware Of Any Reseller Alleging Specific Matters Of Bell Atlantic's Lack Of Compliance With The Act

While the New York Commission concluded in its evaluation that Bell Atlantic “demonstrates that it makes telecommunications services available for resale in accordance with §§ 251(c)(4) and 252(d)(3),” its real assessment is clearly much more tempered.⁵⁷ The New York Commission discounts the concerns of numerous resellers, in part because none of the concerned parties are deemed to be a “significant reseller.”⁵⁸ Further, the New York

⁵⁵ Application at 46.

⁵⁶ Comments of ALTS at 66.

⁵⁷ New York Commission Evaluation at 150.

⁵⁸ *Id.* at 151.

Commission states that it knows of no “specific matters that affect the market.”⁵⁹ As discussed below, there are in fact identifiable “specific matters” which are presently affecting the market. The New York Commission’s inquiry into Bell Atlantic’s compliance with its resale obligations did not examine, as it must, whether Bell Atlantic provides parity of performance to all resellers. The burden clearly lies with Bell Atlantic to prove compliance, not with resellers to prove that Bell Atlantic is acting in a discriminatory fashion. However, in the event that the Commission chooses to endorse the approach of the New York Commission and DOJ, *i.e.*, relying upon a negative implication, the fact remains that a number of commenters cite to specific and identifiable instances in which Bell Atlantic has discriminated against resellers. Such evidence compels the conclusion that Bell Atlantic is failing to meet its obligation to provide its services for resale under Section 271.

For example, Closecall America, Inc. commented extensively on Bell Atlantic’s practice of pricing services for resale in a discriminatory fashion.⁶⁰ Closecall set out, in detail, Bell Atlantic’s practice of “price-squeezing” resale competitors; that is, charging lower retail rates than those it offers at wholesale to competing carriers.⁶¹ Closecall further commented that Bell Atlantic only offers packages of services for resale that have been designed by Bell Atlantic’s retail marketing department.⁶² This is grossly unreasonable because it prevents resellers from customizing their offerings in order to gain market share.

The National ALEC Association (“NALA”) commented that its reseller members commonly encounter discrimination by Bell Atlantic in that Bell Atlantic limits the services that

⁵⁹ *Id.*

⁶⁰ Comments of Closecall at 4.

⁶¹ *Id.* at 4-5.

⁶² *See id.* at 5.

resellers can purchase.⁶³ Further, NALA states that Bell Atlantic fails to achieve parity in regard to billing processes, processing orders, missed appointments, and changing of preassigned telephone numbers which result in billing disputes. The comments of NALA set out a variety of examples which, when viewed in their entirety, compel the Commission to conclude that there is a failure by Bell Atlantic to meet its resale obligations. Additionally, the Telecommunications Resellers Association (“TRA”) cited to specific examples of Bell Atlantic failures. For example, the TRA reported that Bell Atlantic consistently fails to provide resellers with sufficient account support, and OSS at parity.⁶⁴

In order to keep resale as the viable alternative that Congress envisioned, the Commission must ensure that Bell Atlantic offers resale at fair prices. Excel Communications, Inc. agreed that because of the inherent advantages of Bell Atlantic reselling to its own 272 affiliate, Bell Atlantic must be forced to offer competitors significant discounts in order to level the playing field.⁶⁵ Excel further recommended that Bell Atlantic be required to offer total service resale at 20% discount to competitors.⁶⁶ While ALTS is unable to conclude that a 20% discount would be appropriate to deter discrimination by Bell Atlantic, ALTS submits that the Commission must impose some level of discount in order to counter what are essentially internal transfer payments by Bell Atlantic.

The record reveals that Bell Atlantic has made no showing that its resale accounts are treated on a nondiscriminatory basis in regard to its wholesale accounts. CompTel pointed out that Bell Atlantic has not made any showing that it staffs resale accounts in a similar fashion

⁶³ Comments of National ALEC Association at 3-4.

⁶⁴ Comments of TRA at 12-16.

⁶⁵ Comments of Excel Communications, Inc. at 6-10.

⁶⁶ *Id.* at 10-11.

to its wholesale accounts.⁶⁷ CompTel further indicated that Bell Atlantic has revealed nothing about the similarity in compensation of the two sets of employees.⁶⁸ In other words, Bell Atlantic has the ability to transfer senior, experienced employees from its resale accounts division to other parts of the company weakening the group responsible for resale. The comments of TRA also noted that the KPMG Test provides an inaccurate depiction of CLEC treatment because in the words of KPMG: “[Bell Atlantic] resources assigned to handle many of . . . [KPMG’s] problem escalations were very senior [Bell Atlantic] resources” and that “other CLECs do not always get the same level of resources on their problem escalations.”⁶⁹

The DOJ Evaluation seems to dismiss Bell Atlantic’s resale obligation, stating that “resale alone is not likely to be a major avenue for competitive entry.”⁷⁰ DOJ’s opinion as to the viability of resale as an alternative to facilities-based entry does not comport with Congress’s clear intent to promote resale. The DOJ Evaluation only briefly addresses Bell Atlantic’s compliance with its resale obligation, concluding that “[w]hile Bell Atlantic’s wholesale performance to resellers has not been perfect, the Department does not believe that there are performance deficiencies that are *significantly impeding entry by resellers*.”⁷¹

Despite DOJ’s conclusion, the relevant test is not whether a BOC is “significantly impeding entry.”⁷² At a minimum, the relevant test is whether the local market is irreversibly open to competition.⁷³ Regardless of DOJ’s opinion of the viability of resale as a competitive

⁶⁷ Comments of CompTel at 32.

⁶⁸ *See id.*

⁶⁹ Comments of TRA at 9 (citing KPMG Report at II8).

⁷⁰ DOJ Evaluation at 11-12.

⁷¹ *See id.* at 12 (emphasis added).

⁷² *See id.*

⁷³ *See id.*

alternative, DOJ has a duty to review Bell Atlantic's resale compliance by reviewing the record. In light of numerous instances of deficient resale provisioning, including the examples cited in the above discussion, Bell Atlantic's compliance with its resale obligations under the Act clearly have not been met.

B. Bell Atlantic Must Demonstrate That The Termination Penalties Imposed Upon Customers Switching To Resellers Are Just And Reasonable

As the Commission has already recognized, any resale restrictions are presumptively unreasonable. Bell Atlantic's practice of imposing large termination penalties on customers that switch carriers results in a barrier to meaningful competition. Numerous commenters point out that Bell Atlantic routinely follows the practice of forcing customers to pay the entire remainder of their contract, regardless of the time remaining and the actual expense to Bell Atlantic.⁷⁴

ALTS strongly concurs with the proposals submitted by numerous commenters who propose that approval of Bell Atlantic's Application be conditioned upon the adoption of a "fresh look" policy. ALTS believes that Bell Atlantic has failed to meet its burden because it has failed to justify its policy of forcing customers to pay the remaining amount due under their existing contract. Bell Atlantic must be required to submit compelling evidence that its termination penalty policies, which are essentially the same for short-term and long-term agreements, are just and reasonable.

e.spire, Inc./Net2000 aptly characterize Bell Atlantic's termination penalties for what they are – an exercise of monopoly power to "lock in customers to long-term

⁷⁴ Comments of Allegiance at 18-20; Comments of ALTS at 66; Comments of e.spire, Inc./Net2000 at 5, 8; Comments of KMC Telecom, Inc. at 13; Comments of Telecommunications Resellers Association at 23-25.

agreements.”⁷⁵ Additionally, commenters describe the effect of Bell Atlantic’s penalties in antitrust terms; that is, the excessive termination penalties result in the effective imposition of “take-or-pay” liabilities on customers.⁷⁶

If competing carriers are to offer meaningful alternatives to Bell Atlantic, the Commission must provide customers the ability to avoid these termination penalties and have the freedom to switch carriers. In its comments, Allegiance generally proposes a fresh look policy that would allow customers to discontinue long-term contracts without penalties.⁷⁷ e.spire and Net2000 propose two alternative solutions. First, the Commission should implement a fresh look approach for customers with contracts over 180 days remaining in the correct contract term.⁷⁸ Alternatively, the Commission could condition Bell Atlantic’s Application on the use of a “sliding scale” termination liability under which a customer’s liability would vary depending on time during the contract that termination occurs.⁷⁹ These solutions provide consumers with far more flexible options which will diminish Bell Atlantic’s monopolistic advantages over the market.

V. ALTS CONCURS WITH DOJ’S CONCLUSION THAT POST-ENTRY PERFORMANCE COMMITMENTS SHOULD NOT BE RELIED UPON BY THE COMMISSION TO ENSURE THAT EXISTING PROBLEMS ARE RESOLVED

ALTS shares DOJ’s concerns that the New York Commission, in recommending approval of Bell Atlantic’s Application, is entirely too reliant upon Bell Atlantic’s promises to address a number of currently outstanding issues through, among other things, performance

⁷⁵ Comments of e.spire, Inc./Net2000 at 3-5.

⁷⁶ *See id.* at 5.

⁷⁷ Comments of Allegiance at 18-20.

⁷⁸ Comments of e.spire, Inc./Net2000 at 8.

⁷⁹ Comments of e.spire, Inc./Net2000 at 10.

assurance plans, once the company receives Section 271 authority. ALTS submits that the Commission ought to look at both Bell Atlantic's past performance of promises to this Commission, as well as statements that Bell Atlantic is making even while the Commission considers this Application.

A. Bell Atlantic's Failure To Adhere To The Bell Atlantic/NYNEX Merger Conditions And Its Down-Playing Of Other Promises Demonstrates That Bell Atlantic's Promises Of Future Compliance Are Unreliable

Despite clearly violating the "is providing" standard and the "complete as filed" doctrine, the Commission should also be skeptical of Bell Atlantic's commitment to future fixes, based both upon Bell Atlantic's past record of performance of promises made to this Commission, as well as recent statements by Bell Atlantic's citing the enormous difficulty that it will face in complying with the Commission's UNE Remand Order.

Bell Atlantic's failure to comply with the conditions imposed upon the Bell Atlantic/NYNEX merger demonstrates that even if Bell Atlantic's paper promises of future compliance with its 271 obligations could be accepted as a legal matter, Bell Atlantic's promises to comply in the future are wholly unreliable. In its order approving the Bell Atlantic/NYNEX merger⁸⁰ the Commission concluded that in order to alleviate the anti-competitive effects of the merger, Bell Atlantic and NYNEX must comply with a number of merger conditions. As evidenced in comments filed by a number of parties on March 5, 1999 in response to Commission's request for comment on Bell Atlantic's February 5, 1999 merger compliance report, Bell Atlantic still has not complied with all of the merger conditions. For example, conditions 2 and 3 of the Merger Order require Bell Atlantic to provide uniform and functional

⁸⁰ See *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporations and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (Aug. 14, 1997) ("Merger Order").

OSS interfaces to competitors. Specifically, Bell Atlantic committed to providing industry standard OSS interfaces. To date, Bell Atlantic has not met its obligation to provide “region-wide uniform interfaces within 15 months” of merger approval.⁸¹ While Bell Atlantic has deployed the same OSS gateway protocol (*i.e.* the same version of EDI) region-wide, the business rules and specifications that support the gateway vary widely from state to state. This results in CLECs having to establish and maintain duplicative OSS arrangements to provision service in the Bell Atlantic region. In the absence of compliance with the OSS conditions and other promises, the Commission stated that the merger would not have passed the Commission’s public interest test.⁸²

Not only has Bell Atlantic failed to adhere to promises made in the past, but it appears to be hedging on commitments it made in its Application to this Commission. Bell Atlantic promised in its Application that “if this Commission’s recently announced (but not yet released or effective) order on remand from the Supreme Court requires modifications to the previously approved terms for Bell Atlantic’s platform and EEL offerings, Bell Atlantic will comply [post 271] with the Commission’s rules when they become effective absent further relief.”⁸³ Moreover, in its Application Bell Atlantic promised to modify its transport offering to provide “dark fiber” to CLECs on an unbundled basis.⁸⁴ The New York Commission relied upon

⁸¹ *Merger Order* at Appendix C(2)(b) (“Bell Atlantic/NYNEX shall undertake all commercially reasonable efforts to offer to all carriers purchasing interconnection throughout the joint Bell Atlantic/NYNEX region uniform interfaces (including both a GUI-based or other comparable interface and an EDI-based or comparable application to application interface) as soon as reasonably possible and in no event later than 15 months following [FCC] approval of the merger.”) (emphasis added).

⁸² *Merger Order* at ¶ 12.

⁸³ Application at 32-33.

⁸⁴ Application at App. A, Tab 1, ¶ 107 (Lacouture/Troy Declaration) (stating that Bell Atlantic “can provision dark fiber because dark fiber is unbundled fiber transport without the electronics”).

these commitments in recommending approval of Bell Atlantic's Application.⁸⁵ Now it appears that Bell Atlantic wants it both ways, representing to this Commission the speed and ease with which Bell Atlantic will achieve compliance with the UNE Remand Order once 271 authorization is granted, while at the same time seeking to delay a New York proceeding in light of the uncertainty surrounding the Commission's UNE Remand Order.

The ink was barely dry on Bell Atlantic's Application when Bell Atlantic sought to postpone the procedural schedule in the New York Commission proceeding examining unbundled network element rates, arguing that in the absence of the text of the UNE Remand Order, Bell Atlantic "will need an opportunity to assess the impact on the [UNE pricing proposals] set forth in [Bell Atlantic witness] testimony. That assessment cannot be completed—in many respects cannot even begin—until a final [UNE Remand] order is issued."⁸⁶ Accordingly, Bell Atlantic sought to postpone the hearing in the UNE pricing case until April 24, 2000, presumably long after the company presumes the Commission will have granted its Application. Clearly, Bell Atlantic's promises of future compliance cannot be relied upon.

B. The New York Commission's Approval Recommendation Hinges Upon Bell Atlantic's Promises To Address A Number Of Wholesale Performance Issues Once 271 Authority Is Granted

ALTS submits that once Bell Atlantic has set forth a clear and unequivocal track record of compliance it no doubt should be allowed to enter the New York long distance market. However, the evaluation of the New York Commission relies, in large part, on Bell Atlantic's promises to correct its shortcomings once 271 entry is granted by this Commission. As DOJ points out, the New York Commission's positive recommendation is hinged upon Bell Atlantic's

⁸⁵ New York Commission Evaluation at 104.

promises to address, following 271 entry, the following problems: (1) improvement of preorder response times; (2) improvement of LSRC and reject times; (3) increase flow-through of orders; (4) improvement compliance with “change control” procedures; (5) improved compliance with hot cut procedures; (6) disaggregation of data relating to installation problems; (7) improvement of DSL ordering and provisioning procedures; (8) implementation of process improvements for the repair of complex loops; and (9) compliance with the Commission’s UNE Remand Order’s obligation to provide unbundled “dark fiber” transport to CLECs.⁸⁷

ALTS agrees with Teligent: promises of future performance are entirely irrelevant.⁸⁸ Further, as DOJ recognized, Bell Atlantic’s *current* performance in the above listed areas falls short on several counts. First, DOJ points out that Bell Atlantic’s flow through levels are still inadequate, and that a large portion of UNE-platform orders are still being processed manually.⁸⁹ DOJ concludes that this manual processing will certainly result in “customer-affecting service problems when order volumes substantially increase.”⁹⁰

Second, DOJ concluded that Bell Atlantic’s “change control” procedures (*i.e.*, coordinating, testing, and implementing changes) are seriously deficient, and DOJ indicated that it believes that Bell Atlantic will continue to generate significant problems for competitors until it addresses this shortcoming.⁹¹ Specifically, Bell Atlantic rejects a large number of UNE-

(...continued)

⁸⁶ Letter from Thomas J. Farrelly, Bell Atlantic-New York Regulatory Counsel, to New York Commission Administrative Law Judge Joel A. Linsider, Case 98-C-1357 (Oct. 7, 1999).

⁸⁷ DOJ Evaluation at 37, n.100.

⁸⁸ Comments of Teligent at 21 (detailing various Bell Atlantic misrepresentations to Teligent).

⁸⁹ DOJ Evaluation at 29-30.

⁹⁰ *Id.*

⁹¹ *See id.* at 30.

platform orders due to the fact that it does not adequately inform competing carriers, through documentation, of Bell Atlantic's requirements.⁹²

Moreover, ALTS shares DOJ's concerns that Bell Atlantic's enhancement of its flow-through processes, which ideally should allow CLECs to interact with Bell Atlantic's OSS systems, have not been adequately tested. The DOJ Evaluation recognized that the results of these enhancements are simply not in the record.⁹³ The Commission, therefore, must require Bell Atlantic to prove that enhancements to its flow through processes will, in fact, result in nondiscriminatory provision of OSS. Once Bell Atlantic is able to demonstrate an ability to perform these functions contemporaneous with the filing of a Section 271 application at the Commission, ALTS submits that its application could be approved.

C. The Record Clearly Demonstrates That Bell Atlantic's Performance Assurance Plans Are Inadequate And Do Not Meet The Commission's Requirement That BOC's Implement Self-Executing Remedies

ALTS concurs in the assessment of the New York State Attorney General ("NYSAG") that antibacksliding mechanisms are a necessary "insurance policy" that will keep the market open and discourage and penalize anti-competitive Bell Atlantic behavior.⁹⁴ The Commission must, therefore, adopt enforcement mechanisms that are swift and decisive. Further, ALTS shares CompTel's view that the Commission must not limit the remedies available to competitors and should adopt a comprehensive approach utilizing self-executing remedies, carrier initiated remedies, and agency initiated remedies.⁹⁵ ALTS concurs with the statement of Cable & Wireless USA, Inc. that "the absence of effective enforcement mechanisms

⁹² See *id.*

⁹³ DOJ Evaluation at 36.

⁹⁴ Comments of New York State Attorney General at 28.

⁹⁵ Comments of CompTel at 49-51.

could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights.”⁹⁶ ALTS agrees with DOJ that the Commission must develop a plan that: (1) identifies with the clarity the precise level of performance that will be required of Bell Atlantic; (2) provides certainty that inadequate performance will be sanctioned; and (3) sets forth adequate penalties that create incentive to adhere to the required standards.⁹⁷

D. The Amount At Risk In The Performance Assurance Plan Is Too Small

Once Bell Atlantic has been granted approval the penalty for backsliding must be material enough to act as a deterrent against backsliding. Severe financial penalties followed by revocation of 271 authority are the only measures which will prevent Bell Atlantic from harming competition. As numerous commenters recognize, the \$269 million dollar maximum penalty is clearly insufficient.⁹⁸ Because Bell Atlantic stands to reap multi-billion dollar revenues from entry into the New York long distance market, a mere \$269 million dollar penalty will not deter Bell Atlantic from irreparably harming competition in order to gain market share.

Further, the \$269 million amount is illusory in that under the PAP, Bell Atlantic will almost certainly not be required to pay it – no matter how egregious its conduct. CoreComm commented that because the penalty provisions are divided into subcategories, Bell Atlantic will essentially be shielded from full liability.⁹⁹ Further, ALTS agrees with Intermedia’s assessment: Bell Atlantic has crafted the PAP so that it may offset poor performance in one category with

⁹⁶ Comments of Cable & Wireless USA, Inc. at 15 (citing the *Ameritech-Michigan Order* at 20749).

⁹⁷ DOJ Evaluation at 38.

⁹⁸ See, e.g., Comments of DSL.net, Inc. at 8.

⁹⁹ Comments of CoreComm Limited and CoreComm New York, Inc. at 11.

satisfactory performance in another.¹⁰⁰ Additionally, under this “category” approach, penalty amounts are compartmentalized so that each category has a maximum penalty amount. The end effect is that only by failing to perform in each and every category, with no “contributing” delays by the competing carrier, would the possibility of Bell Atlantic facing the maximum penalties arise.

Last, the penalty amounts are in “billing credits,” not direct financial penalties paid to the aggrieved party. ALTS agrees with the conclusion of ChoiceOne that billing credits are an illusory form of relief which will come too late for a competing carrier that experiences discrimination.¹⁰¹ Indeed, as CoreComm commented, billing credits will represent nothing more than a cost of doing business to Bell Atlantic, and will not act as a deterrent.¹⁰² More specifically, as e.spire/Net2000 commented, “[a] predetermined limit on damages will allow an ILEC to perform a cost/benefit analysis in order to ascertain whether inhibiting the emergence of local competition is worth incurring the cost of incurring penalties.”¹⁰³

E. The Commission Must Adopt Stringent Antibacksliding Measures

The Commission must impose antibacksliding measures that are material and severe enough to erase any possibility of intentional backsliding by Bell Atlantic. The Commission must not adopt a limit on liability, but should instead eliminate any caps from the PAP. ALTS agrees with Cable and Wireless’s observation that caps on liability provide an economic incentive for Bell Atlantic to provide substandard performance.¹⁰⁴ ALTS believes that the Commission should impose large monetary fines upon Bell Atlantic for any discriminatory

¹⁰⁰ Comments of Intermedia at 16.

¹⁰¹ Comments of ChoiceOne Communications, Inc. at 12-13.

¹⁰² Comments of CoreComm Limited and CoreComm New York, Inc. at 10.

¹⁰³ Comments of e.spire/Net2000 at 23.

behavior. One suggested approach with which ALTS concurs is that of ChoiceOne Communications. ChoiceOne proposed that Bell Atlantic be subject to a fine of \$50,000 per hour for each hour that a customer is out of service due to a premature Bell Atlantic cutover.¹⁰⁵

In any case, ALTS believes that antibacksliding measures should, at a minimum, reflect the dollar amount that Bell Atlantic stands to realize from approval of its Application. ALTS agrees with the approach of the NYSAG's comments, which stated that the sanctions should be much larger than the cost to comply – factoring in, for example, antitrust treble damages.¹⁰⁶ Such large sanctions, the NYSAG recognized, will necessarily factor in the odds that the conduct will go undetected, the time it will take to penalize, and the cost to the enforcing party.¹⁰⁷ In sum, the antibacksliding measures must be so severe, that Bell Atlantic would not possibly consider intentionally discriminating against competing carriers.¹⁰⁸

(...continued)

¹⁰⁴ Comments of Cable & Wireless USA, Inc. at 16.

¹⁰⁵ Comments of ChoiceOne Communications, Inc. at 13.

¹⁰⁶ Comments of New York State Attorney General at 31.

¹⁰⁷ *See id.*

¹⁰⁸ Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, to P. Hill-Ardoin (Sept. 28, 1999).

VI. CONCLUSION

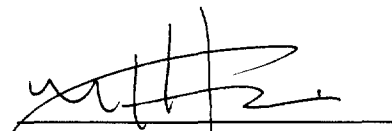
For the foregoing reasons, ALTS urges the Commission to deny Bell Atlantic's instant Application and implement the procompetitive antibacksliding measures advocated herein that will promote the 1996 Act's goal of widespread facilities-based competition.

Respectfully submitted,

**THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES**

Jonathan Askin
Vice President – Law
THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS
SERVICES
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 969-2597

By:



Jonathan E. Canis
Ross A. Buntrock
Michael J. Francesconi
Kelley Drye & Warren LLP
1200 19th Street, N.W.
FIFTH FLOOR
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (fax)

Its Attorneys

November 8, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1999, a copy of the foregoing was delivered by hand, Federal Express, or first-class mail to the following:

* Magalie Roman Salas
Secretary
Federal Communications Commission
Room 802, TW-B204
445 12th Street, SW
Washington, DC 20554

* Janice Myles
Policy and Program Planning Division
Common Carrier Bureau
Room 802, 5-C-327
445 12th Street, SW
Washington, DC 20554

† Leonard Barry
United States Department of Justice
1401 H St. NW, Suite 8000
Washington, DC 20005

† Frances Marshall
United States Department of Justice
1401 H Street N.W.,
Suite 8000
Washington, DC 20530

Judge Eleanor Stein
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

† Donald J. Russell
Department of Justice
Telecommunications Task Force,
Anti-Trust Division
Suite 8000
1401 H. Street, NW
Washington, DC 20530

Lawrence Malone
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Judge Jaclyn Brilling
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Peggy Rubino
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Andrew Klein
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Michael E. Glover
Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Mark L. Evans
Kellogg, Huber, Hansen, Todd & Evans
1301 K Street, NW
Suite 1000 West
Washington, DC 20005

* by hand

† by overnight courier

* International Transcription Service
1231 20th Street, NW
Washington, DC 20036

John Rubino
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

† Penny Rubin
Managing Attorney, Federal Affairs
New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Claudia Pabo
Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Johanna Mikes
Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Daniel Shiman
Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Eric Einhorn
Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* John Stanley
Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Deborah Ramirez
Pricing Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Raj Kannan
Pricing Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Andrea Kearney
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Julie Patterson
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Randall S. Milch
New York Telephone Company
d/b/a Bell Atlantic – New York
1095 Avenue of the Americas
New York, NY 10036

* Dee May
1300 Eye St
Suite 400 West
Washington, DC 20005

* by hand

† by overnight courier

* Renee Terry
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* John Adams
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Tony Dale
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Claudia Fox
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Rhonda Lien
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Jon Reel
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Jane Jackson
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

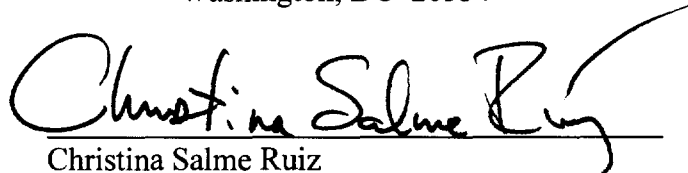
* Carol Matthey
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Michelle Carey
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Doug Slotten
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Sanford Williams
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

* Jessica Rosenworcel
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554


Christina Salme Ruiz

* by hand

† by overnight courier